STATE OF MICHIGAN

COURT OF APPEALS

ROGER ROMANS,

Plaintiff-Appellant,

v

CHARTER TOWNSHIP OF HIGHLAND,

Defendant-Appellee.

UNPUBLISHED
January 19, 2006

No. 256251
Oakland Circuit Court
LC No. 03-051714-NO

Before: Donofrio, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in favor of defendant in this governmental immunity case. Because we hold that the trial court erred in determining that the public building exception, MCL 691.1406, to the governmental tort liability act, MCL 691.1401 *et seq*., precluded recovery in this action as a matter of law, we reverse and remand for further proceedings consistent with this opinion.

Defendant moved for summary disposition under MCR 2.116(C)(7).[1] A motion for summary disposition under MCR 2.116(C)(7) is reviewed de novo. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). A motion under MCR 2.116(C)(7) tests whether a claim is barred because of an immunity granted by law. *Diamond v Witherspoon*, 265 Mich App 673, 681; 696 NW2d 770 (2005). In making a decision under MCR 2.116(C)(7), this Court considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it. *Bryant, supra* at 419.

Plaintiff first contends that the trial court erred in determining that he is precluded from recovery based on his claim that the highway exception to governmental immunity, MCL 691.1402, is applicable.

[1] Defendant also moved for summary disposition under MCR 2.116(C)(8) and (C)(10), but it is clear from the trial court's ruling that the motion was granted in accordance with MCR 2.116(C)(7).

The governmental tort liability act provides immunity for governmental agencies, including municipalities. *Haliw v Sterling Heights*, 464 Mich 297, 302; 627 NW2d 581 (2001). It is well settled in this state that governmental agencies are immune from tort liability while engaging in a governmental function unless an exception applies. *Id.* The highway exception is one such exception. "[T]he highway exception is a narrowly drawn exception to a broad grant of immunity." *Hatch v Grand Haven Charter Twp*, 461 Mich 457, 464; 606 NW2d 633 (2000). An action may not be maintained under the highway exception unless it is clearly within the scope and meaning of the statute. *Id.* The highway exception to governmental immunity provides, in part, that "[a] person who sustains bodily injury or damage to his or her property by reason or failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency." MCL 691.1402(1). A "highway" is defined as "a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles." MCL 691.1401(e).

Whether the walkway in this case falls within the exception depends on whether it was a "sidewalk . . . on the highway." MCL 691.1401(e). As this Court has previously noted, the term "sidewalk" is not defined in the statute. *Stabley v Huron-Clinton Metropolitan Park Authority*, 228 Mich App 363, 367; 579 NW2d 374 (1998). Before *Stabley*, there were also no published Michigan cases that expressly construed the phrase "sidewalks . . . on any highway." *Id.* at 368. In *Stabley*, this Court looked at the dictionary definition of "sidewalk" and the cases applying the highway exception and concluded that the highway exception applied where the injury is sustained on a sidewalk "adjacent" to or "along" a road. *Id.*

Later Michigan cases have apparently agreed with this Court's conclusion in *Stabley*. In *Hatch*, *supra*, our Supreme Court noted that a paved way's proximity to a highway is a necessary condition for determining that it is a sidewalk under the highway exception. *Hatch*, *supra* at 464-465. In *Pusakulich v City of Ironwood*, 247 Mich App 80; 635 NW2d 323 (2001), this Court held that a sidewalk must be adjacent to highway open to public travel in order to be covered by the highway exception. *Pusakulich*, *supra* at 87. In *Haaskma v City of Grand Rapids*, 247 Mich App 44; 634 NW2d 390 (2001), this Court held that a sidewalk between two streets, but adjacent to a parking lot and a building, is not covered by the highway exception because it does not run alongside or adjacent to a public roadway. *Haaskma*, *supra* at 55.

As noted above, we are bound by prior rulings to narrowly construe the highway exception to governmental tort immunity. Furthermore, our Supreme Court has made clear that an action pursuant to MCL 691.1402 may not be maintained unless it is clearly within the scope and meaning of the statute. *Hatch*, *supra* at 464. In this case, there is a parking area and a grassy area between the walkway and the public roadway. Viewing the evidence in a light most favorable to plaintiff, as the non-moving party, we conclude that the grassy area is approximately 30 feet wide. Based on that evidence, we are precluded form holding that the walkway is either alongside or adjacent to John Street. Because the walkway is not alongside or adjacent to a public roadway, we must conclude that the highway exception to governmental immunity is not applicable to the facts of this case. Because we hold that the highway exception to governmental immunity is inapplicable, we need not address defendant's remaining arguments relating to this issue.

The second issue on appeal is whether the public building exception to governmental immunity applies to the facts of this case. The public building exception provides that, under certain circumstances, "[g]overnmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building . . . ." MCL 691.1406.

The resolution of this issue turns on whether plaintiff was injured as a result of a dangerous or defective condition "of a public building." "Mere sidewalks and walkways are clearly outside the scope of the public building exception." *Fane v Detroit Library Comm*, 465 Mich 68, 76; 631 NW2d 678 (2001). In certain situations, however, conditions "of a public building" may be outside of the public building's walls. *Id.* at 77. The inquiry into whether a condition outside of the walls of the public building is still a condition "of a public building" may take two forms. If the condition has a possible existence apart from realty, a fixtures analysis is appropriate to determine if it has been assimilated into the public building. *Id.* at 78. If the condition has no possible existence apart from realty, a court must determine if it is still a condition "of a public building" by considering if the area where the injury occurred is physically connected to and not intended to be removed from the building. *Id.*

In the present case, the covered entryway at issue is more than a mere walkway. At a distinct point, one whole concrete slab of the walkway appears to become covered with a roof and bordered by walls. The roof, walls, and concrete slab form a covered entryway. We first note that the covered entryway is not a fixture because it has no possible existence apart from the realty. Therefore, we must look to whether the covered entryway "is physically connected to and not intended to be removed from the building." *Id.* The covered entryway is physically connected to and not intended to be removed from the public building. Based on those factors, the covered entryway is a condition of a public building. Part of the area where plaintiff's foot was lodged was the concrete slab of the covered entryway. Therefore, we conclude that the public building exception applies to the facts of this case.

Defendant argues that even if the public building exception does apply, plaintiff's claim is barred by the open and obvious doctrine. This Court, however, has concluded "the open and obvious doctrine does not apply to claims brought under the public building exception to governmental immunity." *Pierce v City of Lansing*, 265 Mich App 174, 184; 694 NW2d 65 (2005). Defendant also argues that temporary conditions, like leaves covering the gap between the slabs, cannot constitute defects of a public condition. The alleged defect in this case, however, was the gap itself and that defect is enough to maintain this action.

Reversed and remanded for further proceedings consistent with this opinion.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Alton T. Davis